



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 9, 1998

Mr. David Anderson
Chief Counsel
Office of Legal Services
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR98-3028

Dear Mr. Anderson:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 120436.

The Texas Education Agency ("TEA") received a request for a former teaching assistant's license for in-car instruction and any complaints filed against her or the Panther Driving School. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

To show that section 552.103(a) is applicable, TEA must demonstrate that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). Contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation under section 552.103. Open Records Decision No. 588 at 7 (1991). Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, TEA must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

TEA is authorized to regulate the commercial driver training industry, investigate complaints, and may assess penalties for violations of the Texas Driver and Traffic Safety Education Act. V.T.C.S. art. 4413(29c). Contested case hearings before the commissioner of education are subject to the Administrative Procedure and Texas Register Act. 19 T.A.C. § 157.1041(b). You state that Exhibit 2 represents pending complaints currently under investigation by TEA, and that TEA foresees potential sanctions on the licenses of license holders. You further explain that “the next formal step for the agency to take is to initiate contested-case proceedings against the subjects of the complaints.” We conclude that litigation is reasonably anticipated. We additionally find that the submitted documents in Exhibit 2 are related to the reasonably anticipated litigation for the purposes of section 552.103(a). Therefore, Exhibit 2 may be withheld pursuant to section 552.103.

Generally, once information has been obtained by all parties to the litigation, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. We also note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).¹

Next, you assert that certain information in Exhibit 3 is excepted from public disclosure by the informer’s privilege. Section 552.101 of the Government Code excepts from public disclosure information that is confidential by law. This office interprets this exception as incorporating the “informer’s privilege.” See Open Records Decision No. 515 (1988) (citing *Roviaro v. United States*, 353 U.S. 53 (1957)). The Texas courts have also recognized the informer’s privilege. See *Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). The informer’s privilege aspect of section 552.101 protects the identity of a person who reports a violation or possible violation of the law to officials charged with the duty of enforcing the particular law. The privilege protects individuals who report violations to administrative agencies having a duty to enforce statutes with civil or criminal penalties. See Open Records Decision No. 515 at 2 (1988). The informer’s privilege does not apply if the subject of the information already knows the informer’s identity. Open Records Decision No. 208 at 1-2 (1978).

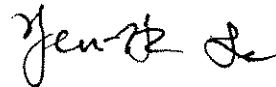
You state that TEA is a licensing agency responsible for regulating the commercial driver training industry. You also state that the complaints in Exhibit 3 allege violations of article 4413(29c) of Vernon’s Texas Civil Statutes and that a violation of the article can result in both civil and criminal penalties. V.T.C.S. art. 4413(29c), § 27. Therefore, we agree that information in Exhibit 3 that tends to identify the informer may be withheld under the informer’s privilege as incorporated by section 552.101 of the Government Code. We

¹As we resolve this matter under section 552.103, we need not address the other exception you have raised for Exhibit 2.

note that, in reaching this conclusion, we assume that the possible violators do not know the identity of the informer.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/nc

Ref.: ID# 120436

Enclosures: Submitted documents

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(w/o enclosures)